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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

KRISTOPHER CANNON, Plaintiff and Appellant, v. RONALD W. BURKLE, Defendant and Respondent.	B165521 (Los Angeles County Super. Ct. No. SC060926)

APPEAL from a judgment of the Superior Court of Los Angeles County, James A. Bascue, Judge. Reversed.

John C. Torjesen & Associates and John C. Torjeson, Esner & Chang, Stuart B. Esner, and Andrew N. Chang for Plaintiff and Appellant.

Bragg & Kuluva, Stacie MacDonald and Alan P. Modig for Defendant and Respondent.

Plaintiff and Appellant Kristopher Cannon sustained injuries when he fell backwards off a curb and down an adjacent slope while providing security at a function on the property of Defendant and Respondent Ronald Burkle. Cannon sued Burkle for negligence and premises liability. The trial court granted Burkle's motion for summary

judgment on the grounds that no dangerous condition existed where the accident occurred, and this appeal followed. We find that Cannon demonstrated the existence of a disputed issue of material fact as to dangerous condition, and that workers' compensation exclusivity does not bar this claim as a matter of law. The judgment is reversed.

FACTUAL AND PROCEDURAL BACKGROUND

On May 19, 1999, Cannon, an officer with the Beverly Hills Police Department, sustained injuries while providing security for a visiting dignitary at a function at Burkle's home in Beverly Hills. The Secret Service held primary responsibility for the security, and directed the work of the Beverly Hills Police officers. While awaiting assignment, Cannon walked along an unpaved jogging path on the property with a group of officers. Cannon stepped up on the cement curb edging the path to allow others to pass. To create more space, Cannon leaned backwards and adjusted his left foot back, keeping his right foot stationary. His left foot went over the side of the cement curb and, upon contact with a dirt slope adjacent to the curb, Cannon rolled over the top of his left foot and fell down a hill. Cannon sustained leg and back injuries.

Cannon sued Burkle for negligence and premises liability, claiming there was an unreasonably dangerous condition on Burkle's property. Cannon also filed a workers' compensation claim. Burkle moved for summary judgment on the grounds that Cannon's claims were barred by workers' compensation exclusivity, or, in the alternative, that there was no dangerous condition on the premises.

In support of his motion for summary judgment, Burkle submitted the declaration of Ned Wolfe, an engineer. Wolfe asserts Cannon's injury occurred "on an unpaved walking/jogging path, with a concrete curb on each side. . . ." He describes the concrete curb as approximately six inches wide and two inches high, adjacent to "a 16 inch vertical drop to the terrain below which slopes downwards and away from the path." He states "the area is covered with brush" but asserts "the drop in elevation was clearly visible." Finally, Wolfe expressed his opinion that neither the curb nor the adjacent areas created a dangerous condition.

Cannon opposed Burkle's motion for summary judgment, claiming workers' compensation exclusivity was not applicable to the case, and that there was evidence of a dangerous condition. In support of his opposition to summary judgment on the grounds of the dangerous condition, Cannon submitted the unsigned declaration of architect Jerry Pollak. Pollak opined, in relevant part, "The area where plaintiff Kristopher Cannon fell, was in an unreasonably dangerous condition because immediately next to the walkway is a concealed drop off of approximately four feet without a required guard rail." Cannon also submitted a Separate Statement of Disputed and Undisputed Material Facts, specifying the unreasonably dangerous condition causing his injury was the concealed and unprotected four foot drop off next to the walkway.

On January 10, 2003, the trial court granted Burkle's motion for summary judgment on the grounds that there existed no dangerous condition. The trial judge found Burkle met his initial burden with Ned Wolfe's declaration. Specifically, the judge found, "The Separate Statement, Fact 7, establishes that there was no dangerous condition in the area where the accident happened, therefore, the burden has shifted to [Cannon] to raise a triable issue."[1] The trial judge determined Cannon did not meet his burden because Pollak's declaration "is wholly conclusory and does not raise a triable issue."[2] The trial court entered a judgment against Cannon, and this appeal followed.

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[1] Separate Statement, Fact 7, states, "There existed no defective condition to the area where the accident happened." The supporting evidence is Wolfe's declaration and Cannon's deposition.

[2] Burkle objected to Pollak's declaration because it was unsigned when originally submitted in Cannon's opposition to summary judgment. The trial judge admitted the declaration.

DISCUSSION

Standard of Review

A trial court properly grants summary judgment when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) As movant, the defendant bears the initial burden of making a prima facie showing that no triable issue of material fact exists and "that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Once the defendant makes such a showing, the burden shifts to the plaintiff to raise a triable issue of fact. (*Id.*; see also Code Civ. Proc., § 437c, subd. (p)(2).)

On appeal from a summary judgment, "[w]e review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) The evidence must be viewed in favor of the plaintiff as the losing party, construing the submissions of the plaintiff liberally and those of the defendant strictly. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

1. *There is a disputed issue of material fact.*

A landowner is responsible "for any injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury on himself." (Civ. Code, § 1714.) The duty owed to invitees is one of reasonable care, and a landowner's failure to repair, or warn an invitee about, a dangerous condition can constitute negligence. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119.) "Whether a given set of facts and circumstances creates a dangerous condition is usually a question of fact. [Citation.] The issue of a dangerous condition becomes a question of law only where

reasonable minds can come to only one conclusion. [Citation.]" (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 991.)

The motion asserts that there are no disputed facts with respect to this issue, relying on the expert declaration of Ned Wolfe. Wolfe, in concluding that there was no dangerous condition, made factual assertions about the property. Specifically, Wolfe's description indicates there is "a 16 inch vertical drop" that is "covered with brush," though "completely visible," constituting the hill that Cannon claims caused his injuries.

In response, Cannon denies that the fact is undisputed, and presents the declaration of his expert witness, Pollak. Pollak declares that he observed and photographed the property, and that the drop is four feet, not 16 inches. Based in part on this fact he concluded a dangerous condition existed on the property. The existence of this critical factual difference as to the key issue on negligence requires submission of the case to the jury.[3]

2. *Workers' compensation exclusivity does not bar this claim.*

Citing a line of Supreme Court cases dealing with the expanding doctrine of workers' compensation exclusivity, Burkle asserts that Cannon's workers compensation claim bars the suit against Burkle because there is no evidence that Burkle negligently retained control over the premises or affirmatively contributed to the injuries. However, the absence of such evidence is not dispositive, as Cannon is seeking to recover not on a theory of retained control, but of premises liability. A landowner owes a duty of reasonable care to invitees on his property. (*Rowland v. Christian, supra,* 69 Cal.2d at p. 119; see also Rest.2d Torts § 343.) Further, an employee of an independent contractor

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[3] Cannon makes several contentions about the adequacy of the declaration of Jerry Pollak. Those arguments do not address the dispute concerning the depth of the drop-off relied on by each expert for his opinion, and thus need not be addressed. The issue of signature, which is relevant, is not dispositive. Cannon filed a signed copy of the declaration prior to the hearing, constituting substantial compliance with Code of Civil Procedure section 2015.5 (See *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 21, fn 11; *Pacific Air Lines, Inc. v. Superior Court* (1965) 231 Cal.App.2d 587, 588-589.) The trial court properly admitted the declaration.

is an invitee for the purposes of tort liability. (*Gettemy v. Star House Movers, Inc.* (1964) 225 Cal.App.2d 636, 644-645.) Because the rationale of the *Privette-Hooker* line of cases does not eliminate the general premises liability cause of action, the workers' compensation claim does not bar this claim.

a. The Privette-Hooker line of cases

Beginning with *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*), the California Supreme Court has described the circumstances in which an employee of a contractor may sue a property owner or hirer of the contractor in tort. In *Privette*, an employee of a contractor hired to install a roof was burned after his employer instructed him to carry hot buckets of tar up a ladder. (*Id.* at p. 692.) The employee sought workers' compensation benefits for his injuries, and also sued the hirer of the contractor under the doctrine of peculiar risk. (*Ibid.*) The court barred the employee's recovery, finding the extension of tort liability under peculiar risk to the employees of an independent contractor hired to do dangerous work "advances no societal interest that is not already served by the workers' compensation system." (*Id.* at p. 692.) Specifically, the court found it unfair for a hiring entity to suffer greater liability than the contractor who actually caused the injury, but whose tort liability is limited by workers' compensation. (*Id.* at p. 698.) Further, because workplace injuries are covered by workers' compensation, employees would receive an unwarranted windfall if also allowed to recover from the hirer. (*Id.* at p. 700.)

The Supreme Court revisited the *Privette* holding in *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253 and *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235. In *Toland*, the court held *Privette* barred recovery under the peculiar risk doctrine for the hirer's direct liability under section 413 of the Restatement Second of Torts, as well as vicarious liability under section 416.[4] (*Toland, supra,* 18 Cal.4th at p. 265.) In *Camargo*, the court extended *Privette* to bar recovery for negligent hiring under section

[4] All section references are to the Restatement Second of Torts unless otherwise indicated.

411, reaffirming that the holding is not limited to a hirer's vicarious liability. (*Camargo, supra,* 25 Cal.4th at pp. 1243-1244.)

Finally, in *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, the court addressed the tort of negligent exercise of retained control under section 414, establishing a rule of affirmative contribution: "a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Id.* at p. 202.) This rule meets the potential unfairness concerns of *Privette* because the hirer's own affirmative conduct warrants liability beyond that of the contractor. (*Id.* at p. 213.) With respect to the windfall question, because workers' compensation exclusivity does not bar an injured employee from suing anyone who is a proximate cause of an injury, the employee does not receive an unwarranted windfall when he recovers from a hirer who negligently retained control. (*Id.* at p. 214; see also *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 222 [as to negligent provision of unsafe equipment, a hirer can be liable "insofar as the hirer's provision of unsafe equipment affirmatively contributes to the employee's injury."].)

b. Workers' compensation is not a per se bar to premises liability claims by injured employees of independent contractors against landowners.

Burkle contends this line of cases necessarily bars Cannon's premises liability claim. We disagree. First, the *Privette-Hooker* line of cases do not address the premises liability cause of action, nor do they hold or imply that an employee of an independent contractor *cannot* bring a premises liability claim against a landowner.

Second, workers' compensation exclusivity precludes injured employees from suing hirers only when the injury arises from the act or omission of the contractor employing the injured plaintiff. In a premises liability action, where, as here, the claim is that a known pre-existing condition of the property affirmatively contributes to the injury, the *Privette* cases do not bar liability; the rule creates a bar only when the dangerous condition is determined to be the result of the contractor's negligence. (*Sheeler v.*

Greystone Homes, Inc. (2003) 113 Cal.App.4th 908, 921-922 [employee's recovery was barred because there was no evidence that the dangerous condition was pre-existing or in any way due to the action of the property owner].) In contrast, Cannon's premises liability suit against Burkle is founded on the negligence of the property owner alone.

Third, the policy concerns underlying *Privette* do not apply to a premises liability claim founded solely on the negligence of the landowner. There is no unfairness where, as here, the landowner is alleged to bear sole responsibility for the conditions causing the injury. Similarly, Cannon's recovery in this suit would not constitute an unwarranted windfall. Workers' compensation exclusivity "does not preclude the employee from suing anyone else whose conduct was a proximate cause of the injury." (*Privette, supra,* 5 Cal.4th at p. 697; *Hooker, supra,* 27 Cal.4th at p. 214.) A dangerous condition on the property would be a breach of Burkle's duty of reasonable care owed to Cannon. If that condition is shown to cause injury, the owner's tort liability, and the worker's recovery, would be warranted.

This result is also consistent with prior authority concerning direct negligence. In *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120, an employee of an independent contractor was killed after being hit in the head with construction materials blown off a bridge by high winds. (*Id*. at p. 1123.) The deceased employee's wife sued the owner of the construction project, claiming negligent maintenance of the work site. (*Id.* at p. 1124.) The owner contended that the *Privette* rationale barred the suit as a matter of law, but the appellate court held the *Privette-Hooker* line of cases does not bar all direct liability claims by injured employees of independent contractors against property owners. (*Id.* at p. 1129; see also *Park v. Burlington Northern Santa Fe Railway Co.* (2003) 108 Cal.App.4th 595, 605 [plaintiff may prevail against hirer of independent contractor on direct negligence theory].)

While Burkle relies on *Zamudio v. City and County of San Francisco*, that case does not compel the results he seeks. There, in considering the dangerous condition theory of recovery, the court relied on the fact that the dangerous condition was created by the plaintiff's employer; the "property was not itself dangerous." (*Zamudio v. City and*

County of San Francisco (1999) 70 Cal.App.4th 445, 454-455.) Cannon here contends Burkle's negligence did directly cause the injuries, and that it was the property itself, not the actions of Cannon's employers, that was dangerous.

For all the reasons stated above, we do not think the *Privette-Hooker* line of cases was intended to, or does, eliminate the premises liability cause of action. We decline the invitation to hold workers' compensation exclusivity to be a per se bar against premises liability claims by injured employees of independent contractors against negligent landowners.

DISPOSITION

The trial court's summary judgment is reversed, and the case is remanded for further proceedings consistent with this opinion. Appellant is to recover his costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

JOHNSON, J.